



Office of the Attorney General  
State of Texas

June 28, 1993

DAN MORALES  
ATTORNEY GENERAL

Mr. Wes Griggs  
Attorney at Law  
P. O. Box 517  
West Columbia, Texas 77486

OR93-368

Dear Mr. Griggs:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 19237.

The City of West Columbia ("the city") has received a request for information regarding telephone conversations between a city dispatcher and the former chief of police. Specifically, the requestor seeks:

a copy of the back up dispatch tape on the conversations between [a city dispatcher and the former chief of police] that took place the latter part of January, 1993 or the first part of February, 1993.

You contend that the requested information is excepted under sections 3(a)(1), 3(a)(3), and 3(a)(8).<sup>1</sup>

Section 3(a)(1) excepts "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You state that "the publication of contents of the tapes may somehow invade [the dispatcher's] right to confidentiality of what she obviously believed was a private telephone conversation." In addition, the attorney representing the dispatcher claims that the conversations are private and that the recordings were made without her knowledge and consent, and without the knowledge or

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<sup>1</sup>You have submitted for our review a tape recording of six phone conversations covering the periods of February 1, 2, and 4, 1993. We note that only four of the six conversation segments are within the ambit of the request, *i.e.*, those on the following dates at the following times: 1) 2/1/93 from 4:58 a.m. to 5:10 a.m.; 2) 2/2/93 from 4:55 a.m. to 5:05 a.m.; 3) 2/2/93 5:33 a.m. to 5:58 a.m.; and 4) 2/4/93 7:21 a.m. to 7:28 a.m. We do not reach any determination regarding the conversations on the tape recording not subject to the request.

consent of the other party to the conversations. We are not persuaded by these arguments.

We have listened to the telephone conversations and we find there is sufficient reason to believe the dispatcher and the former chief of police were aware that there was a possibility the conversations were being recorded. Furthermore, we do not believe that a city dispatcher has a reasonable expectation that telephone calls she makes while on duty in her work station are private. *See generally Bower v. State*, 769 S.W.2d 887, 896 (Tex. Crim. App. 1989) (using two-fold test to determine whether a search is constitutional: 1) whether there is a subjective expectation of privacy; and 2) whether the expectation of privacy is one society is prepared to recognize as reasonable). Accordingly, you may not withhold the tape recordings under section 3(a)(1) on the basis that they reveal "private conversations."

Section 3(a)(1) encompasses the common-law privacy doctrine. In order for information to be brought within the common-law right of privacy under section 3(a)(1), the information must meet the criteria set out in *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4. Although some of the telephone conversations touch upon arguably "intimate" or "embarrassing" matters, we conclude that the requested conversations in their entirety are of legitimate public interest since they were made on a city telephone line by a city dispatcher while on duty. Open Records Decision Nos. 455 (1987) (legitimate public concern may overcome any right of common-law privacy when public figures are involved); 316 (1982) at 3 (information is not excepted by common-law privacy merely because it might embarrass individuals or governments).

Section 3(a)(3) excepts

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or

political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Information must relate to litigation that is pending or reasonably anticipated to be excepted under section 3(a)(3). *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

You argue that "disclosure of the contents of these conversations would prejudice the City's position in any subsequent civil litigation brought by [the dispatcher] against the City." You base your argument on the fact that the dispatcher indicates in the recorded conversations that she may bring suit against the city. We have previously held that an isolated telephone threat of litigation is not enough to trigger section 3(a)(3), nor is a public statement on more than one occasion of an intent to sue. Open Records Decision No. 452 (1986). Section 3(a)(3) requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). You have not shown that litigation is pending or reasonably anticipated. Furthermore, you have not demonstrated that the information on the tape recordings *relates* to the litigation you believe the dispatcher intends to pursue. Therefore, you may not withhold the requested information under section 3(a)(3).

Section 3(a)(8) excepts

records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

Where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 3(a)(8) may be invoked by any proper custodian of information which relates to the incident. Open Records Decision Nos. 474 (1987); 372 (1983). You claim that the tapes constitute evidence that the dispatcher tried to destroy governmental records. You do not indicate, however, that there is in fact an ongoing investigation into this matter, or that an investigation is pending. Accordingly, you have failed to demonstrate that section 3(a)(8) applies.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Mary R. Crouter  
Assistant Attorney General  
Opinion Committee

MRC/LBC/Imm

Ref.: ID# 19237  
ID# 19318

Enclosures    Marked documents

cc:    Ms. Wanda Wilkerson  
      215 11 1/2 Street  
      West Columbia, Texas 77486  
      (w/o enclosures)